Supreme Court, U.S.
FILED
AUG 23 1971
E. ROBERT SEAVER, CLERK

71-268

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. A-79

ARTHUR HARRY ECKERT, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August 20, 1971

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Argument and Authorities	2
Statement of the Case	2
Summary	12
Conclusion	12
Appendix (Opinion and Judgment of Court of Appeals)	App.1

CITATIONS

CASES:

Carter v. United States 332 Fed. 2d 728, 730 (8th Cir. 1964)	10
District of Columbia v. Armes 107 U.S. 519, 521, 522 (1883)	9
Funk v. United States 290 U.S. 371 (1933)	7
Lisenba v. California 314 U.S. 219 (1941)	8
Lockard v. Parker, et al 164 Fed. 2d 804 (4th Cir. 1947)	11
Reid v. United States 12 How. 365 (1851)	8
Rosen v. United States 245 U.S. 467 (1917)	8,11
Washington v. State of Texas 388 U.S. 14, 87 S.C. 1920 (1967)	7

MISCELLANEOUS:

A.L.I., Model Code of Evid. Number 101, p. 891 (1942)	10

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The Petitioner, ARTHUR HARRY ECKERT, respectfully prays that a Writ of Certiorari issur to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in No. 30192, styled Arthur Harry Eckert, James Edward Miles and Joe Felix Zamora v. United States of America, on June 2, 1971.

OPNION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Western District of Texas.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 2, 1971. A timely petition for rehearing was denied on June 29, 1971. An application for extension of time in which to file this petition for writ of certiorari was filed on July 16, 1971, and the application was granted on July 21, 1971, extending to and including August 28, 1971, the time for filing this petition for writ of certiorari. This petition for writ of certiorari was filed within the authorized time permitted by this Court. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether or not the Petitioner's conviction and sentence is void because he was denied his rights under the Sixth Amendment to the Constitution of the United States to have compulsory process in obtaining an available witness in his favor, namely, James Edward Miles, a co-indictee, charged and convicted for the same transaction, which co-indictee was willing to testify in behalf of this petitioner, and his testimony could have exonerated this Petitioner.

CONSTITUTIONAL PROVISIONS WHICH ARE IN ISSUE

United States Constitution, Amendment VI:

> " . . . to have compulsory process for obtaining witnesses in his favor, . . . "

STATEMENT OF THE CASE

The Petitioner and two others were jointly indicted for commiting offenses against the United States in violation of Title 21, United States Code, Sections 331 (Q) (3) (A), and 331 (Q) (3) (B). Specifically, the first count of the indictment charged the Petitioner and the co-indictees with felonious possession of barbiturates and amphetamines for the purpose of sale, delivery or disposal to another, in violation of Title 21, United States Code, Section 360 a (c) (1). The second count of the indictment charged the Petitioner and the co-indictees with unlawful possession of amphetamine and barbiturate tablets and capsules in that such possession was not obtained directly and pursuant to a valid prescription from a practitioner licensed by law to prescribe or administer such drugs, in violation of Title 21, United States Code, Section 360-a (c) (2). The indictments charged that the Petitioner and the co-indictees, jointly and separately, committed said offenses and that the offenses occurred on or about May 7, 1969, within the jurisdiction of the United States District Court for the Western District of Texas.

The Petitioner was convicted under the second count contained in the indictment and was assessed a $1,000.00 fine and sentenced to one year in the Federal Department of Corrections; from which judgment the Petitioner duly perfected his appeal to the United States Court of Appeals for the Fifth Circuit.

The Petitioner, since the inception of this case, made known to the Court his intention to call the co-defendant James Edward Miles to the witness stand, and for that reason he filed his motion for severance which would enable the Petitioner to call the said co-defendant in the event he refused to testify; however, in this case the co-defendant James Edward Miles was willing to testify in behalf of the Petitioner, and his testimony would have corroborated the Petitioner's version of the case.

This case was originally assigned to be tried before the Honorable Henry N. Graven, Senior Judge. Because of his death the case was reassigned to the Honorable, Thomas J. Clary, Senior Judge, from Pennsylvania. The trial of this case was heard in six different proceedings. The proceedings as referred to in this petition are listed below:

(1) First Call Docket, September 12, 1969;
(2) Second Call Docket, January 30, 1970;
(3) First Competency Hearing of James Edward Miles, February 6, 1970;
(4) Trial of Arthur Harry Eckert, Petitioner herein, and Joe Felix Zamora, February 10, 1970;
(5) Second Competency Hearing of James Edward Miles, June 22, 1970; and,
(6) Arguments and Sentencing, June 23, 1970.

On June 19, 1969, the three defendants, James Edward Miles, the Petitioner ARTHUR HARRY ECKERT, and Joe Felix Zamora, were arraigned before the Honorable Adrian Spears, United States District Judge for the Western District of Texas sitting in San Antonio. They each entered a plea of not guilty. The Petitioner herein requested a severance from his two co-defendants. (S.F. First Call Docket, 9-12-69, pp 1-4). Severance was requested because the Petitioner herein desired to call his co-defendants to the stand, and unless the co-defendants were willing to testify voluntarily, they could not be forced to take the witness stand without a severance. The motion was denied at that time by the Court. (S.F. First Call Docket, 9-12-69, p.3). The Petitioner therefore did not insist upon a severance as he understood that he would be permitted to call the co-defendant James Edward Miles to the witness stand without prejudicing the said co-defendant's rights. (S.F. First Call Docket, 9-12-69, p. 9).

The co-defendant James Edward Miles, by virtue of Title 18 U.S.C., Section 4244, was adjudged incompetent to stand trial. (S.F. First Competency Hearing, 2-6-70, p.36). The Government psychiatrist, Dr. Allen Chittenden, was the only witness at that hearing. He testified that co-defendant James Edward Miles had sufficient present ability to consult and assist his attorney. Further, that in his opinion co-defendant James Edward Miles had a rational as well as factual understanding of the proceedings against him. (S.F. First Competency Hearing, 2-6-70, p. 16). Also, Dr. Chittenden testified that co-defendant James Edward Miles could relate facts which occurred in his presence in 1969 (S.F. First Competency Hearing. 2-6-70, p.31), and that the co-defendant James Edward Miles could relate in rather good detail events surrounding the circumstances of his arrest. (S.F. First Competency Hearing, 2-6-70, p.33).

The Petitioner herein *repeatedly* requested or made known to the Court his desire to call co-defendant James Edward Miles as a witness. In each case the Petitioner's request was denied. (S.F. First Call Docket; 9-12-69, p. 4; S.F. First Competency Hearing, 2-6-70, p. 34; S.F. Tr. of ECKERT, 2-10-70, pp. 1-4; S.F. Argument and Sentencing, 6-23-70, pp. 16-18).

Co-defendant James Edward Miles was adjudged competent to stand trial at a second competency hearing on June 22, 1970. (S.F. Second Competency Hearing, 6-22-70, p. 50). The Government psychiatrist, Dr. Harold B. Fam, testified James Edward Miles showed no evidence of any disassociation of his thought processes (S.F. Second Competency Hearing, 6-22-70, pp. 15-17), and that co-defendant James Edward Miles was oriented as to time, place and circumstance surrounding his arrest, and that he had present ability to consult with his lawyer with a reasonable degree of rational understnding (S.F. Second Competency Hearing, 6-22-70, p. 19).

At the trial on the issue of guilt or innocence of this Petitioner, Detective Charles Butler testified that he observed this Petitioner seated in the middle back seat of a parked car. Butler testified he observed the Petitioner hand a brown paper

sack to co-defendant James Edward Miles which was then dropped out of the rear window. (S.F. Tr. of ECKERT, 2-10-70, p. 14). The sack was found to contain barbiturates.

This Petitioner took the witness stand in his own behalf and testified that on the night in question he had been to a number of clubs with a man named Arnold McCoy. McCoy was interested in talking to the co-defendant Joe Felix Zamora. McCoy noticed co-defendant Joe Felix Zamora's car and this Petitioner drove up and parked behind co-defendant Joe Felix Zamora's automobile. McCoy got out of the car and talked to the driver of the other car. He returned to this Petitioner and told him that a friend named "Mop" (co-defendant James Edward Miles) wished to speak to the Petitioner. (S.F. Tr. of ECKERT, 2-10-70, p. 140). The two men then returned to co-defendant Joe Felix Zamora's vehicle and this Petitioner entered the car for the purpose of speaking to the co-defendant James Edward Miles. (S.F. Tr. of ECKERT, 2-10-70, pp. 143-144). This Petitioner testified he never handed any package to co-defendant James Edward Miles (S.F. Tr. of ECKERT, 2-10-70, p. 152).

This Petitioner's version would have been corroborated by co-defendant James Edward Miles, had James Edward Miles been permitted to testify as a witness for this Petitioner. It was for this purpose that James Edward Miles would have been called. (S.F. Tr. of ECKERT, 2-10-70, pp. 5,6).

The only other possible corroborative evidence that could have been obtained was from co-defendant Joe Felix Zamora who was called to testify but refused to answer any and all questions on the grounds of self-incrimination. (S.F. Tr. of ECKERT, 2-10-70, pp. 178-181).

THE PETITIONER'S CONVICTION AND SENTENCE IS VOID BECAUSE HE WAS DENIED HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO HAVE COMPULSORY PROCESS IN OBTAINING AN AVAILABLE

WITNESS IN HIS FAVOR, NAMELY, A CO-INDICTEE, CHARGED AND CONVICTED FOR THE SAME TRANSACTION, WHICH CO-INDICTEE WAS WILLING TO TESTIFY IN BEHALF OF THIS PETITIONER, AND HIS TESTIMONY WOULD HAVE EXONERATED THIS PETITIONER.

This Petitioner requested on several occasions that the co-defendant James Edward Miles be allowed to testify as a witness in his behalf. A request was made prior to the Court's finding that James Edward Miles was incompetent to stand trial (S.F. First Call Docket, 9-12-69, pp. 6,7). A similar request was submitted to the Court subsequent to adjudication of incompetency (S.F. Tr. of ECKERT, 2-10-70, p. 4). Finally, a request was tendered to the Court after James Edward Miles had been re-adjudicated competent to stand trial (S.F. Arguments and Sentencing, 6-23-70, p. 17). Each request was denied by the District Court.

By refusing to permit co-defendant James Edward Miles to testify, the Court violated this Petitioner's constitutional right to "compulsory process for obtaining witnesses in his favor" guaranteed by the United States Constitution, Amendment VI.

The testimony of co-defendant James Edward Miles would have corroborated the testimony of this Petitioner to the effect that he was in this car for only a few minutes and did not hand a sack of barbiturates to co-defendant James Edward Miles. Whether the trial court would have believed James Edward Miles is irrelevant. This Petitioner had the constitutional right to place the co-defendant James Edward Miles on the witness stand and have the testimony considered by the trier of facts. The Court, by denying James Edward Miles an opportunity to testify, prejudged the credibility of this witness without ever having heard him testify. The Court had never heard James Edward Miles testify, and the Court had absolutely no basis for an opinion that the co-defendant James Edward Miles was not a credible witness. In fact, the only evidence which was presented in the trial of this case regarding the credibility

of the co-indictee James Edward Miles was the evidence on his mental competency. The record is completely void as to the substance of James Edward Miles' testimony with the exception of the ex parte statement made in chambers by defense counsel.

In regard to the accused's right to call witness in his own behalf, the Supreme Court, in *Washington v. State of Texas*, 388 U.S. 14, 87 S.C. 1920 (1967), recently said:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of the due process of law.
>
> "We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to the events that he had personally observed, and whose testimony would have been relevant and material to the defense."

Under modern rules, co-defendants are allowed to testify for the benefit of one another. In holding a co-defendant was competent to testify, the United States Supreme Court, in *Funk v. United States*, 290 U.S. 371 (1933), stated at Page 380:

> "Whatever was the danger that an interested witness would not speak the truth - and the danger never was as great as claimed - its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances."

In another opinion in *Rosen v. United States*, 245 U.S. 467 (1917), the High Court pointed out:

> "In the almost twenty years which have elapsed since the decision of the Benson Case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, *rather than by rejecting witnesses as incompetent*; with the result that this principle has come to be widely, almost universally, accepted in this Country and in Great Britain." (Emphasis ours).

Also, Petitioner respectfully calls the Court's attention to *Lisenba v. California*, 314 U.S. 219 (1941), where the Court said:

> "The aim of the requirement of due process in a criminal trial is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."

The right denied this Petitioner is fundamental to our Federal system of jurisprudence. The right is embodied in an Amendment to our Constitution, and as the High Court pointed out in *Reid v. United States*, 12 How. 365 (1851):

> "But as soon as the public attention was called to the fact that the securities for a fair and impartial trial by jury in criminal cases had not been inserted among the cardinal principles of the new government, they hastened to amend it, and to secure to a party accused of an offense against the United States the same mode of trial,

and the same mode of proceeding, that had been previously established and practiced in the courts of the several states.

"It was for this purpose that the Fifth and Sixth Amendments were added to the Constitution. The Sixth Amendment provides that, in all criminal prosecutions, the party accused shall be entitled to a trial by jury, to be confronted with the witnesses against him, *to have compulsory process for the witnesses in his favor*, and to have the aid of counsel in his defense." (Emphasis ours).

Denying this Petitioner relief sets a dangerous precedent. Any time a court acts as a trier of facts, it could exclude any and all evidence in behalf of the defendant simply because the court "wouldn't believe it on a stack of Bibles," which was the excuse of the District Court in the present case. (S.F. Arguments and Sentencing, 6-25-70, p. 20). Our adversary system works on the theory that both the State and Defense present their evidence to the Court. From this evidence, and from this evidence alone, the fate of the defendant is determined. If the trier of facts is allowed to judge the credibility of witnesses without ever hearing their testimony in a court of law, then a defendant is denied the benefit of the adversary system and mandatory process of witnesses.

James Edward Miles was willing to testify had the Court permitted. (S.F. Arguments and Sentencing, 6-25-70, p. 17). This Petitioner had a constitutional right to call James Edward Miles as a witness in his behalf. Even though the trial court adjudged James Edward Miles to be incompetent to stand trial as a defendant (S.F. First Competency Hearing, 2-6-70 pp. 35,36), he was competent as a witness. The uncontradicted evidence clearly reflects that James Edward Miles was competent as a witness and could recall and relate the facts and circumstances surrounding the alleged offense. (S.F. First Competency Hearing, 2-6-70, p. 31). Therefore, he should have been permitted to testify.

A person may be a competent witness even though he is incompetent as a defendant. In *District of Columbia v. Armes*, 107 U.S. 519, 521, 522 (1883), the Court stated:

"The general rule, therefore is that a lunatic or a person affected with insanity, is admissible as a witness if he has sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the question at issue."

The *Armes* opinion also states:

"But lunacy or insanity assumes so many forms and is so often partial in its extent, being frequently confined to particular subjects, while there is full intelligence of others that the power of the Court (to hold a witness disqualified to testify) *is to be exercised with greatest caution.*

"The authorities are replete concerning cases where persons showing mental derangement on some subjects, evince a hegh degree of intelligence and wisdom on others. The existence of partial insanity does not render unfit as witnesses, individuals so affected for the transaction of business on all subjects, nor from giving a perfectly accurate and lucid statement of what they have seen or heard."

(Parenthetical expression and emphasis ours).

In *Carter v. United States*, 332 Fed. 2d 728, 730 (8th Cir. 1964), the Court states:

"The test of competency of a witness is the capacity to communicate relative material and to understand there is an obligation to do so truthfully."

A.L.I., Model Code of Evid. Number 101, p.891 (1942), expresses the modern rule as follows:

"Every person is qualified to be a witness as to any material matter unless the judge finds that

(a) the proposed witness is incapable of expressing himself concerning the matter so far as to be understood by the judge and jury, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth."

The United States Supreme Court has noted, in *Rosen v. United States*, 245 U.S. 471 (1917):

"...the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the Court..."

In *Lockard v. Parker, et al*, 164 Fed. 2d 804 (4th Cir. 1947), the Fourth Circuit held:

"A person of unsound mind is not necessarily an incompetent witness but may be permitted to testify if he has sufficient understanding of the nature of an oath and is capable of giving correct account of what he has seen and heard."

The medical experts at both competency hearings in uncontradicted testimony stated that James Edward Miles could remember and relate facts surrounding the events in question. (S.F. First Competency Hearing, 2-6-70, pp. 35, 36, and S.F. Second Competency Hearing, 6-22-70, pp. 15–17).

Notwithstanding the expert medical opinions which stood alone as the only evidence bearing on the competency of James Edward Miles, the trial court arbitrarily and capriciously refused to permit James Edward Miles to testify in behalf of this Petitioner. By so doing, the Court abused its discretion in judging the competency of a witness and violated the Petitioner's constitutional right to compulsory process for obtaining witnesses in his favor.

Since James Edward Miles could have related facts and circumstances surrounding the alleged offense and the arrest, he was competent to testify. Since James Edward Miles' testimony

would have corroborated that of this Petitioner, the Court's refusal to permit such testimony constituted prejudicial and reversible error and violated this Petitioner's rights as secured by the United States Constitution, Amendment VI.

SUMMARY

In summary, the Petitioner submits that the Fifth Circuit Court of Appeals in its written opinion, which appears in the Appendix hereto, stated that the trial judge, who was the trier of the facts, was well aware of the substance of the proposed testimony of James Edward Miles. Petitioner submits that the only testimony submitted to the trial court was an ex parte statement made by the defense attorney to the court in chambers (S.F. Tr. of ECKERT, 2-10-70, p. 5), and that the actual testimony was never presented by the witness himself, and, further that there was never any evidence presented to the trial court which would have authorized the trial judge to prejudge the credibility of said witness and thereby arbitrarily refuse this Petitioner the right to call said witness to the witness stand.

We deal here with a fundamental right – the right of the Petitioner to present the truth in defense of criminal charges against him. For a court to deny him access to a witness capable of presenting that truth is to indulge in a dangerous practice that this Court has condemned by a prior decision (*Washington v. State of Texas*, 388 U.S. 14, 87 S.C. 1920 (1967)).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30192

Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES EDWARD MILES, JOE FELIX ZAMORRA, ARTHUR H. ECKERT,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas.

(June 2, 1971)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

WISDOM, Circuit Judge: Arthur Harry Eckert, James Edward Miles, and Joe Felix Zamorra were charged in a two-count indictment with violating the federal statutes relating to barbiturates and ampheta-

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

mines.[1] The three defendants pleaded not guilty, waived trial by jury, and went to trial before the district court. The court found Miles and Eckert not guilty on Count I, but guilty on Count II. The court found Zamorra guilty on both counts. Miles was sentenced to serve a one-year term in the custody of the Attorney General. Eckert was sentenced to serve a one-year term and was fined $1,000. Zamorra was sentenced to serve concurrent terms of five years and one year and was fined $1,000. All three defendants have appealed.

I.

The three defendants argue that the district court erred in admitting into evidence the pills found in Za-

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[1]The indictment reads as follows:

THE GRAND JURY CHARGES:

That on or about May 7, 1969, ARTHUR HARRY ECKERT, aka Bunny Eckert, JAMES EDWARD MILES and JOE FELIX ZAMORRA, within the Western District of Texas, did unlawfully possess for the purpose of sale, delivery and other disposal to another a number of tablets and capsules of amphetamine and barbiturate, "depressant or stimulant drug[s]" within the meaning of 21 U.S.C. 321(v), in violation of Title 21, United States Code, Section 331(q) (3) (A).

COUNT TWO

That on or about May 7, 1969, ARTHUR HARRY ECKERT, aka Bunny Eckert, JAMES EDWARD MILES and JOE FELIX ZAMORRA, within the Western District of Texas, did unlawfully possess a number of tablets and capsules of amphetamine and barbiturate, "depressant or stimulant drug[s]" within the meaning of 21 U.S.C. 321(v), which were not obtained directly or pursuant to a valid prescription from a practitioner licensed by law to prescribe and administer such drugs while acting in the course of his professional practice, in violation of Title 21, United States Code, Section 331(q) (3) (B).

morra's car on the ground that the police officers' search of the car was made without a valid warrant and therefore in violation of the Fourth Amendment. We cannot agree.

The Supreme Court has long held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search of a house or an office. Indeed, under the *Carroll*[2] doctrine police officers may search without a warrant any automobile that they have probable cause to believe contains contraband. *Chambers v. Maroney*, 1970, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419; *Brinegar v. United States*, 1949, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; *United States v. Hill*, 5 Cir. 1971, F.2d [No. 21,086, May 5, 1971]. Our task in this case is to examine the record to see whether at the moment the police officers searched Zamorra's car they had probable cause to believe that the car contained illegal merchandise.

On May 7, 1969, Charles Butler of the San Antonio Police Department received word from an informer that the defendant Zamorra had in his possession a large quantity of barbiturates and was scheduled to meet that night a Negro known as "Mop" near the corner of Hedges and Vargas streets in San Antonio to transact a sale. The informer had previously informed Butler that Zamorra had been selling amphetamine and barbiturate tablets and capsules in commercial quantity. Butler had known the informer for several

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[2]Carroll v. United States, 1925, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543.

months and on similar occasions in the past the informer had furnished him information that turned out upon investigation to be true.

Butler proceeded to the 100 block of Vargas Street where he found parked in the dark an automobile that he knew to be Zamorra's. He fashed a light in the car and recognized Zamorra behind the steering wheel and Eckert in the back seat. He also saw sitting in the front seat a Negro man, later identified as Miles. He watched Eckert hand Miles a brown sack, which Miles dropped out the side-window of the car. Butler then radioed for help and got out of his car to investigate. He went up to Zamorra's car and found a brown paper sack on the ground. Inside the sack he saw several packages of red capsules wrapped in cellophane. At that time three other police officers arrived on the scene. The officers arrested the three defendants. It was then that they searched Zamorra's car. Underneath the back seat the officers discovered a large quantity of amphetamines and barbiturates.

On this evidence we hold that at the moment the police officers searched Zamorra's car they had probable cause to believe that the car contained illegal drugs.[3] It follows then that the district court did not err in denying the defendants' motion to suppress on the ground that the evidence was obtained in violation of the Fourth Amendment.

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[3]Since we find sufficient cause to justify the search of Zamorra's automobile under the *Carroll* doctrine, we need not decide whether the search might also be justified as a search incident to a valid arrest. *See, e.g.*, United States v. Nooks, 5 Cir. 1971, F.2d [No. 29,334, May 19, 1971].

II.

Eckert argues that the district court erred by continually refusing to permit his co-defendant Miles to testify.

At the trial Eckert testified that on the night in question he was riding in his car with Arnold McCoy. They spotted Zamorra's car parked on Vargas Street. McCoy wanted to speak to Zamorra. Eckert stopped his car behind Zamorra's and McCoy got out. McCoy soon returned and said that Miles wanted to speak to Eckert. Eckert then got into Zamorra's car, where Officer Butler later found him. Eckert testified that while in Zamorra's car he never handed any sack to Miles. Eckert argues that had Miles been permitted to testify he would have corroborated Eckert's testimony.

The first time the matter arose during the trial the district court would not allow Miles to testify because he had been adjudged incompetent. Eckert now argues, however, that one who has been found incompetent to stand trial may nevertheless be a competent witness and that the court erred in refusing to permit Miles to testify at that point. Miles was later adjudged competent to stand trial and in fact went to trial before the court and was found guilty. At that time Eckert again asked the court to permit Miles to testify that Eckert had not handed him the brown paper sack. This time the court denied the request saying, "I wouldn't believe Miles under a stack of Bibles on that question." The following colloquy then occurred between Eckert's counsel and the trial judge:

MR. SEMANN: But Your Honor, the Appellate Court might.

THE COURT: Well, I'm the trier of the facts.

The trial judge then commented as follows:

> Well, the Appellate Court if it sees it through my eyes will see a scheme of distributing drugs in which Miles, Eckert, and Zamorra were a party. That's the view-point of the trier of the facts. And it's extremely fortunate that they don't have felony convictions against them. It would take very little more evidence to establish that against them.

Eckert now argues that regardless whether Miles was credible he had a right to call him as a witness in his behalf.

It would have been better practice for the court to have permitted Miles to testify on behalf of Eckert, but in the circumstances of this case we do not think that Eckert was prejudiced by the exclusion of the evidence. The major reason underlying the constitutional confrontation rule embodied in the Sixth Amendment is to give a defendant, charged with a crime, an opportunity to cross-examine witnesses against him. This right of confrontation allows a defendant to test the recollection and sift the conscience of a witness. It compels the witness to stand face-to-face so that the jury may look at him and decide, by his demeanor and manner in which he gives his testimony, whether he is worthy of belief. Here, however, the trial judge was

the trier of facts. Throughout the trial the trial judge was well aware of the substance of Miles' proposed testimony. In the end he found that corroboration by Miles would not add any weight to Eckert's testimony; the Government's evidence on the point was too convincing. In the limited circumstances of this case, therefore, any error in the exclusion of Miles' testimony was harmless. *See* Rule 52(a), F.R.Crim.P.

For the reasons set out above, the judgments of the district court are AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30192

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES EDWARD MILES, JOE FELIX ZAMORRA,
ARTHUR H. ECKERT,
Defendant-Appellants.

Appeals from the United States District Court for the Western District of Texas

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(June 29, 1971)

ON PETITIONS FOR REHEARING

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

PER CURIAM: That part of our original opinion beginning on page 6 of the slip opinion with the words "Eckert now argues ..." and ending on page 7 with the words "*See* Rule 52(a), F.R.Crim.P." is withdrawn, and the following is substituted:

Eckert now argues that regardless whether Miles was credible he had a right under the Sixth Amendment to call him as a witness in his behalf. *See Washington v. Texas*, 1967, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019. It would have been the better practice for the trial court to have permitted Miles to testify on behalf of Eckert, but in the circumstances of this case we think that Eckert was not prejudiced by the exclusion of the evidence. It is important to remember that in this case the trial judge was the trier of facts. As such, he was the sole judge of the weight of the evidence. In the course of lengthy pre-trial proceedings and the trial itself, the trial judge had become thoroughly familiar with Miles's character and mental condition. Throughout the trial the judge was well aware of the substance of Miles's proposed testimony. In the end he found that corroboration by Miles would not add any weight to Eckert's testimony; the Government's evidence on the point was too convincing and Miles's credibility doubtful. In the limited circumstances of this case, therefore, any error in the exclusion of Miles's testimony was harmless. *See* Rule 52(a), F.R.Crim.P.; *Chapman v. California*, 1967, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.

It is ORDERED that the petitions for rehearing filed by Arthur H. Eckert and Joe Felix Zamorra in the above entitled and numbered cause be and the same are hereby DENIED.

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CERTIFICATE OF SERVICE

This is to certify that I, OSCAR C. GONZALEZ a member of the Bar of the Supreme Court of the United States, pursuant to Supreme Court Rule 33, (2) (a), have duly mailed, via Air Mail, postage prepaid, a true copy of the foregoing Petition for Writ of Certiorari to The Solicitor General, Department of Justice, Washington, D.C. 20530, and also to the United States Attorney, Western District of Texas, P.O. Box 1701, San Antonio, Texas 78206.

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Counsel for Petitioner

Dated: August 20, 1971

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Nos. 71-268 and 71-5315

In the Supreme Court of the United States

OCTOBER TERM, 1971

ARTHUR HARRY ECKERT, PETITIONER

v.

UNITED STATES OF AMERICA

JOE FELIX ZAMORA, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury-waived trial with one Miles in the United States District Court for the Western District of Texas, petitioners were convicted of unlawful possession of amphetamines and barbiturates (21 U.S.C. (Supp. V) 331(q)(3)(A) and (B)). Petitioner Eckert (who was convicted on only one count) was sentenced to one year's imprisonment and a $1,000 fine; petitioner Zamora (who was convicted on two counts) was sen-

444-749—71

tenced to concurrent prison terms of five years and a $1,000 fine. The court of appeals affirmed (Pet. App.).

Petitioners contend that the trial judge committed reversible error when he refused to let Eckert call as a witness co-defendant Miles to corroborate Eckert's version of the events. The trial judge pointed out that he was the trier of facts and that he was aware of Miles' character and poor mental condition;[1] therefore he would not believe Miles "under a stack of Bibles."[2] The court of appeals, although recognizing that it would have been better practice to have permitted Miles to testify, properly concluded that the error was harmless beyond a reasonable doubt in the circumstances of this case.[3]

Petitioner Zamora also contends that the officers did not have probable cause to believe that his car contained illegal drugs when they searched it following the arrest of the three defendants therein. Briefly, the evidence, as summarized in the opinion below (Pet. App. 3–4, showed that on May 7, 1969, San Antonio police officer Butler received word from an informant who had previously furnished reliable information that Zamora had a large quantity of barbiturates in his possession and was scheduled that night to meet a Negro man at a specified location to transact a sale.

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[1] Miles had initially been found incompetent to stand trial.

[2] Miles was allegedly going to testify as to whether Eckert had handed Miles a brown sack; a police officer had so testified, and Eckert had denied the officer's testimony.

[3] As below, petitioner Zamora merely joins in this argument and adopts the brief of petitioner Eckert. This claim would not, however, logically affect the proof of Zamora's guilt.

Butler, who shortly before this had been advised by a federal narcotics agent that there was an outstanding parole violator's warrant for Zamora and that the federal bureau had also received information that Zamora was selling dangerous drugs in the San Antonio area, went to the specified location. He observed a parked automobile which he knew was Zamora's. From his own vehicle he shined a portable floodlight into the car and saw petitioner Zamora at the wheel, Miles in the front passenger seat, and petitioner Eckert in the rear. He also saw Eckert hand Miles a brown paper sack which Miles dropped out the window of the car. Butler radioed for assistance and then got out of his car to investigate. He picked up the sack which had been dropped on the ground and observed red capsules (which he believed to be seconal pills) wrapped in cellophane. At about that time other officers arrived and petitioners and Miles were arrested. The officers then searched Zamora's car and discovered a large amount of amphetamines and barbiturates underneath the back seat.

Petitioner Zamora apparently does not dispute that these facts considered alone established probable cause for the arrest and search as the court below held. He argues, however, that the reliability of the informant's tip was undermined by the fact that a previous search of Zamora's house pursuant to a search warrant, obtained on the basis of the same informant's information, had proved fruitless (see Pet. (No. 71–5315) 4, 8–9). This contention ignores the record. The record shows that the search warrant was obtained on May 6,

1969, and executed about 6:00 p.m. on May 7, 1969, only a few hours prior to the events described above. The search warrant included petitioner's car, if found at the motel premises which Zamora occupied. However, neither Zamora nor his car was at the premises when the warrant was executed; this prompted officer Butler to check with the informant and he was advised that Zamora was then on his way to transact a sale of the drugs. Obviously, in these circumstances, the fact that the search warrant when executed had not revealed any illicit drugs did not detract from the reliability of the informant's tip.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.